Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

NEW HAMPSHIRE HEMP COUNCIL, INC.
and DEREK OWEN,

Petitioners,

v.

DONNIE R. MARSHALL, ACTING
ADMINISTRATOR, UNITED STATES
DRUG ENFORCEMENT ADMINISTRATION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, criminalizes *inter alia* the possession, distribution and manufacture of controlled substances, *21 U.S.C. § 841(a)(1)*, including the substance "marihuana," as defined in 21 U.S.C. § 802(16). Petitioners New Hampshire Hemp Council, Inc. and Derek Owen attempted to challenge the United States Drug Enforcement Administration ("DEA")'s interpretation of the statutory definition of "marihuana" as embodying congressional intent to criminalize, not only the psychoactive variety of *Cannabis sativa L.* (commonly known as marijuana), but also the non-psychoactive variety (commonly known as hemp).

In the United States District Court for the District of New Hampshire, petitioners established as undisputed fact, under generally accepted plant science precepts, that the terms "hemp" and "marijuana" refer to biologically and genetically distinct plant varieties of cannabis sativa; and further, that it is impossible to derive the psychoactive controlled substance marihuana from the hemp plant variety. Nevertheless, the lower courts dismissed petitioners' complaint, holding that the plain intent of the statute is to include within the definition of "marihuana" both cannabis sativa varieties, without excluding the non-psychoactive variety. The question presented here is:

Is the statutory definition of the controlled substance "marihuana" intended to encompass non-psychoactive hemp?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Statutes, Acts of Congress and Constitutional Provisions Involved in the Case 2

Statement of the Case 4

Reasons for Granting the Writ 8

I. The First Circuit Has Decided an Important Question of Federal Law that Has Not Been, But Should Be, Settled By This Court, In A Way That Conflicts with the Standards Set Forth in *Corning Glass Works, Casey* and *Wells* 8

II. The First Circuit Has Decided This Important Federal Question In A Way That Conflicts with the Standards Set Forth In *Robinson, Aaron, Rodriguez,* and *Ron Pair Enterprises, Inc.* 10

III. The First Circuit Has Decided This Important Federal Question In A Way That Conflicts with the Fair Warning Standards Set Forth In *McBoyle, Bass, Lanier,* and *Liparota* 12

Conclusion 14

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Aaron v. Securities and Exchange Commission, 446 U.S. 680, 100 S.Ct. 1945 (1980) 11

Corning Glass Works v. Brennan, 417 U.S. 188, 94 S.Ct. 2223 (1974) 8, 10

Liparota v. United States, 471 U.S. 419, 105 S.Ct. 2084 (1985) 13

McBoyle v. United States, 283 U.S. 25, 51 S.Ct. 340 (1931) 12

Robinson v. Shell Oil Co., 117 S.Ct. 843 (1997) 10

Rodriguez v. United States, 480 U.S. 523, 107 S.Ct. 1391 (1987) 11

United States v. Bass, 404 U.S. 336, 92 S.Ct. 515 (1971) 12, 13

United States v. Easley, 70 F.3d 65 (8th Cir. 1995) 5

United States v. Honneus, 508 F.2d 566 (1st Cir. 1974), *cert. den.*, 95 S.Ct. 1677 (1975) 5, 6, 9

United States v. Kelly, 527 F.2d 961 (9th Cir. 1976) 6

United States v. Lanier, 117 S.Ct. 1219 (1997) 12, 13

United States v. Proyect, 989 F.2d 84 (2nd Cir. 1993), *cert. denied*, 510 U.S. 822 (1993) 6

United States v. Ron Pair Enterprises, Inc., 489 U.S. 240, 109 S.Ct. 1026 (1989) 11

United States v. Wells, 117 S.Ct. 921 (1997) 8, 9

West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 11 S.Ct. 1138 (1991) 8, 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

21 U.S.C. § 801(7) 2, 10

21 U.S.C. § 802(16) 2, 7

21 U.S.C. § 812 2

21 U.S.C. § 841(a)(1) 3

26 U.S.C. § 4741, *et seq.* (repealed 1970) 4

28 U.S.C. § 1254(1) 2

Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513 i

Marihuana Tax Act of 1937, Pub. L. No. 75-238, ch. 553, 50 Stat. 551 (1937) 4

United Nations Single Convention on Narcotic Drugs of 1961 ..... 2, 10

SUPREME COURT RULE 10(c) 10

SUPREME COURT RULE 13.1 1

OTHER AUTHORITIES

Taxation of Marihuana: Hearings on H.R. 6906 Before the Senate Comm. on Finance, 75th Congress, 1st Sess. 7 (1937) 4

PETITION FOR WRIT OF CERTIORARI

New Hampshire Hemp Council, Inc. and Derek Owen respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on March 28, 2000, in order to settle an important question of federal law that has not been, but should be, settled by this Court, and to resolve the conflict with relevant decisions of this Court on the important question presented herein.

OPINIONS BELOW

As amended by an Errata filed by the First Circuit on March 28, 2000, App. 15, the opinion of the United States Court of Appeals for the First Circuit appears at 203 F.3d 1. The opinion as amended is reproduced in the Appendix hereto at page App. 1. By order filed on March 28, 2000, the First Circuit denied the petition for rehearing and suggestion for rehearing en banc. App. 17.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the First Circuit was entered on January 28, 2000. By order filed March 28, 2000, the First Circuit denied the Hemp Council and Owen's timely-filed petition for rehearing and suggestion for rehearing en banc. Pursuant to Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES, ACTS OF CONGRESS AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

A. 21 U.S.C. § 801. Congressional findings and declarations: controlled substances [in relevant part:]

. . .

(7) The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances.

B. 21 U.S.C. § 802(16).

The term "marihuana" means all parts of the plant *Cannabis sativa L.*, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

C. 21 U.S.C. § 812. Schedules of controlled substances [in relevant part:]

(a) Establishment

There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. . . .

. . .

(c) Initial schedules of controlled substances

Schedules I, II, III, IV, and V shall . . . consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

. . .

Schedule I

(a) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

. . .

(10) Marihuana.

D. 21 U.S.C. § 841(a)(1) [in relevant part:]

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .

STATEMENT OF THE CASE

Legal/factual Background

Since enactment of the Marihuana Tax Act of 1937, Pub. L. No. 75-238, ch. 553, 50 Stat. 551 (1937), *see* 26 U.S.C. § 4741, *et seq.* (repealed 1970), the federal government has sought to proscribe the manufacture, possession and/or distribution of a substance Congress termed "marihuana," which has always been defined, in relevant part, as "all parts of the plant *Cannabis sativa L.*, whether growing or not . . . " The *full* definition, *see* page 2, *ante*, specifically excludes, however, numerous plant parts and products, manifesting Congress's intent that in proscribing marihuana, "the production and sale of *hemp and its products* for industrial purposes will not be adversely affected by this bill."[1]

For reasons beyond the scope of petitioners' claims, industrial hemp cultivation in the United States had effectively ceased prior to the appearance of cases in which criminal defendants claimed the substance seized from them was in fact not "marihuana," as defined in the statute. There have been two types of such defenses, only

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[1] *Taxation of Marihuana: Hearings on H.R. 6906 Before the Senate Comm. on Finance*, 75th Congress, 1st Sess. 7, 17 (1937) (statement of Harry J. Anslinger, Commissioner, Federal Bureau of Narcotics) (emphasis added).

one of which has required courts to construe the statutory definition.

Where defendants sought refuge in the government's alleged failure to prove the substance seized was nothing more than hemp, the definition has never been at issue; it has been beyond dispute that, legally, there is a "difference between marijuana [sic] and wild hemp plants (which have no drug value)," *United States v. Easley*, 70 F.3d 65, 67 (8th Cir. 1995) (upholding conviction where officer testified he could distinguish "marijuana" from hemp without scientific testing).[2]

However, other defendants have seized on Congress's employment of a precise scientific term – seemingly making the definition species-specific – to argue that the government failed to prove the substance seized was in fact *Cannabis sativa*, and not a genetically distinct strain, such as *Cannabis indica* or *Cannabis ruderalis*. Those defendants' logic is inescapable, but they have not prevailed, because, in response, courts have consistently held that Congress's species-specific language is sufficiently ambiguous to allow inquiry into congressional intent. *See, e.g., United States v. Honneus*, 508 F.2d 566, 575 (1st Cir. 1974), *cert. den.*, 95 S.Ct. 1677 (1975) (finding "evidence of confusion over terminology"). The result was the conclusion that "Congress adopted 'Cannabis sativa L.' believing it to be the term that scientists used to

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[2] Most modern cases dispense with the statutory term "marihuana" in favor of the popular term "marijuana." However, the statutory term is consistently employed herein when referring to the controlled substance defined by federal law.

embrace all *marijuana-producing* Cannabis." *Id.* (emphases added); *see also United States v. Kelly*, 527 F.2d 961, 963 (9th Cir. 1976); and *United States v. Proyect*, 989 F.2d 84, 88 (2nd Cir. 1993), *cert. denied*, 510 U.S. 822 (1993). The courts found an intent to proscribe any Cannabis variety having euphoria-producing properties, and ever since, the term "marihuana" has been *effect*-specific. The various defendants thus lost because none could dispute that the substances seized possessed euphoria-producing properties, regardless of species.

Relying on the historic legal distinction between hemp and marihuana, as well as the undisputed scientific fact that the terms "marijuana" and "hemp" refer to genetically different strains of *Cannabis sativa*, with only "marijuana" having any psychoactive properties, *cf.* App. 11 (First Circuit opines: "It may be that *at some stage* the plant destined for industrial products is useless to supply enough THC for psychoactive effects" (emphasis added)), petitioners New Hampshire Hemp Council, Inc. ("Hemp Council"), a New Hampshire non-profit organization, and Derek Owen ("Owen"), an agricultural producer and State Representative, sought to promote and engage in the agricultural cultivation of hemp – highly prized for its uniquely valuable fiber, other by-products, and environmental benefits – and to secure passage of state legislation establishing a permitting, research and regulation scheme for a renewed agricultural hemp industry.[3]

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[3] Despite the characterization in the First Circuit opinion, petitioners' proposed legislation would not have served to "legalize" anything. *See* App. 5. Its sole purpose was to regulate a presumptively legal agricultural product. Beyond this, the

However, the petitioners (and the legislature) were deterred by the position of the U.S. Drug Enforcement Administration ("DEA"), by which the DEA construes the definition of "marihuana" in 21 U.S.C. § 802(16) to include any and all cannabis sativa varieties, regardless of marihuana producing attributes, so that the cultivation of hemp would constitute the illegal manufacture of "marihuana" (absent a DEA "marihuana" license).

Procedural Background

On April 30, 1998, the Hemp Council and Owen brought a claim in the United States District Court for the District of New Hampshire against the DEA Administrator, seeking a declaration

> that . . . Congress intended only to criminalize the psychoactive variety of *Cannabis sativa L.* (commonly known as marijuana), and not the non-psychoactive variety of Cannabis sativa L. (commonly known as hemp), so therefore, to obtain a "marihuana" conviction, the government must prove beyond a reasonable doubt that the plant or substance at issue is the marijuana variety of Cannabis sativa L., and is not the hemp variety.

Petitioners also sought, *inter alia*, an injunction, specifically enjoining the DEA from

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opinion of the First Circuit does contain various misstatements of fact, too numerous to itemize here. The facts relevant to the question presented, however, are entirely undisputed and are fully set forth herein.

> asserting prosecutorial jurisdiction . . . over persons engaging in, attempting or advocating the possession, manufacture or distribution of the non-psychoactive variety of *Cannabis sativa L.* (commonly known as "hemp").

The district court dismissed, primarily finding that the petitioners lacked standing, but in the course of that holding the court also reached the merits of the statutory construction claim. The First Circuit affirmed, but solely on the merits, *i.e.*, on its construction of the statutory definition, App. 9-14, after first finding that the petitioners have standing, App. 4-9.

REASONS FOR GRANTING THE WRIT

I. The First Circuit Has Decided an Important Question of Federal Law that Has Not Been, But Should Be, Settled By This Court, In A Way That Conflicts with the Standards Set Forth in *Corning Glass Works*, *Casey* and *Wells*.

Because the decision below decides the important federal question of the proper reach of the statutory definition of "marihuana" without recognizing the clearly accepted meaning of the term in both legislative and judicial practice, the decision conflicts with the standards set forth in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 11 S.Ct. 1138 (1991), and *United States v. Wells*, 117 S.Ct. 921 (1997); and further, because the decision fails to refer to the art or science to which the term is appropriate, the decision conflicts with the standards set forth in *Corning Glass Works v. Brennan*, 417 U.S. 188, 94 S.Ct. 2223 (1974).

As already noted, because "the *Cannabis* plant is a genus having three species, *sativa, indica,* and *ruderalis,*" *Honneus,* 508 F.2d at 574, courts have long ago resolved the statutory ambiguity in Congress's use of the phrase "the plant *Cannabis sativa L.,*" by refining the term "marihuana" into a well-settled *un*ambiguous statutory term of art, which means "any type of the plant producing the hallucinogenic material popularly known in this country as 'marihuana,' " *id.* at 575, *i.e.,* "any and all marijuana-producing Cannabis," *Id.*

The fact that the statutory term "marihuana" embraces "all marijuana-producing Cannabis" necessarily implies that it must exclude all non-marijuana-producing Cannabis, *e.g.,* hemp. The term's "clearly accepted meaning in both legislative and judicial practice," *Casey,* 499 U.S. at 98, 11 S.Ct. at 1147, unambiguously excludes hemp as a matter of undisputed fact. *See also Wells,* 117 S.Ct. at 927 ("We do, of course, presume that Congress incorporates the common-law meaning of the terms it uses if those ' "terms . . . have accumulated settled meaning under . . . the common law" ' and " 'the statute [does not] otherwise dictat[e]" ' ").

Courts' thorough analysis of congressional intent resulted in the recognition of "marihuana" as a statutory term of art. To ascertain what if any congressional intent may have existed regarding hemp, a similar reading of the legislative history underlying the specific carve-outs in the definition makes it unavoidably plain that "Congress's intent, as manifested in this history, was to use these terms to incorporate into the Federal Act . . . well-defined and well-accepted . . . principles . . . so

as to ensure that {here, hemp cultivation} would be outside the purview of the Act," *Corning Glass Work*, 417 U.S. at 201-202, 94 S.Ct. at 2231 (1974).[4]

Because the First Circuit's decision contravenes the standards set forth in these decisions, certiorari is appropriate. SUPREME COURT RULE 10(c).

II. The First Circuit Has Decided This Important Federal Question In A Way That Conflicts with the Standards Set Forth In *Robinson, Aaron, Rodriguez,* and *Ron Pair Enterprises, Inc.*

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 846 (1997) (citations omitted).

The First Circuit and all its sister circuits have historically rejected the existence of any "plain meaning" for

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[4] The First Circuit finds, in 1970, no "clear indication that Congress intended to protect plant production for industrial use." App 13. However, in 21 U.S.C. § 801(7), *supra* at 2, Congress expressly declares, "The United States is a party to the Single Convention on Narcotic Drugs, 1961," *id.*, which recognizes that there is a difference between *Cannabis* grown for its resin (marijuana) and *Cannabis* grown "exclusively for industrial purposes." The Convention also *exempts* industrial *Cannabis* from coverage and *requires* parties to the Convention only to "adopt such measures as may be necessary to prevent the misuse of, and all traffic in, the leaves of the *cannabis* plant." Hence, Congress clearly recognized its obligation to exclude hemp from the prosecutorial reach of the marihuana proscription.

the statutory phrase "the plant *Cannabis sativa L.*," by rejecting criminal defendants' entitlement to a species-specific defense. In conflict with *Robinson*, however, in the instant case, the First Circuit *embraces* a "plain meaning" for this statutory phrase, *i.e.*, "a literal reading of the statute," App. 9, 14, despite courts' long-standing acceptance of the need to look instead to its legislative purpose.

"[I]f the language of a provision . . . is sufficiently clear in its context and *not at odds with the legislative history*, it is unnecessary 'to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.' " *Aaron v. Securities and Exchange Commission*, 446 U.S. 680, 696, 100 S.Ct. 1945, 1955 (1980) (emphasis added, citation omitted). *See also Rodriguez v. United States*, 480 U.S. 523, 525-26, 107 S.Ct. 1391, 1393 (1987) ("no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." (Emphasis in original)).

"The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 240, 242, 109 S.Ct. 1026, 1031 (1989) (citation omitted, brackets in original). "In such cases, the intention of the drafters, rather than the strict language, controls." *Id.* (citation omitted). Here, the

express legislative history repeatedly shows Congress's unmistakably clear intent and understanding that this statutory definition would protect hemp from its reach; that intent could not possibly be *more* clear.

Because the First Circuit's decision finds plainness and not ambiguity in the definition of "marihuana," and produces a result demonstrably at odds with the intentions of its drafters, certiorari is appropriate here.

III. The First Circuit Has Decided This Important Federal Question In A Way That Conflicts with the Fair Warning Standards Set Forth In *McBoyle, Bass, Lanier,* and *Liparota.*

"It is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States,* 283 U.S. 25, 27, 51 S.Ct. 340, 341 (1931). Courts " 'require that Congress should have spoken in language that is clear and definite.' " *United States v. Bass,* 404 U.S. 336, 347, 92 S.Ct. 515, 522 (1971) (citations omitted).

As one of the "manifestations of the fair warning requirement," *United States v. Lanier,* 117 S.Ct. 1219, 1225 (1997), "the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it to conduct clearly covered," *Id.* "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes

the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability," *Liparota v. United States*, 471 U.S. 419, 427, 105 S.Ct. 2084, 2089 (1985) (citation omitted), and "provides a time-honored interpretive guideline when the congressional purpose is unclear," *Id.*

Finally, and perhaps most pertinent here, "although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, . . . due process bars courts from applying a *novel construction* of a criminal statute to *conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope . . .* " *Lanier*, 117 S.Ct. at 1225 (emphasis added, citations omitted).

While " 'it is not likely that a criminal will carefully consider the text of the law before he murders or steals,' " *Bass*, 404 U.S. at 348 n. 15, 92 S.Ct. at 522 n. 15, given the existence of both legal and illegal cannabis products, from two well-demarcated cannabis varieties, one of which is "marihuana"-producing, while the other is not, "it is not unreasonable to imagine a citizen attempting to 'steer a careful course between violation of the statute and lawful conduct,' " *Id.* (citation and brackets omitted). In this case the manufacture or possession of a plant that could never, ever *possibly* – under any set of circumstances – either be marihuana or be made into marihuana, must clearly fall outside the statute's "fair warning" line.

Certiorari is thus appropriate here.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

NEW HAMPSHIRE HEMP
COUNCIL, INC.
AND DEREK OWEN
By Their Attorney,
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United States Court of Appeals
For the First Circuit

No. 99-1082

NEW HAMPSHIRE HEMP COUNCIL, INC.
and DEREK OWEN,

Plaintiffs, Appellants,

v.

DONNIE R. MARSHALL, ACTING
ADMINISTRATOR, UNITED STATES
DRUG ENFORCEMENT ADMINISTRATION,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[Hon. Joseph A. DiClerico, Jr., *U.S. District Judge*]

Before

Selya, Boudin and Lynch,

Circuit Judges,

Gordon R. Blakeney, Jr. for appellants.

Dana J. Martin, Appellate Staff, Civil Division, Department of Justice, with whom *David W. Ogden*, Acting Assistant Attorney General, *Paul M. Gagnon*, United States Attorney, and *Mark B. Stern*, Appellate Staff, Civil Division, Department of Justice, were on brief for appellee.

January 28, 2000

BOUDIN, *Circuit Judge.* This case, which involves the definition of marijuana as used in federal criminal statutes, has its origin in a defeated legislative proposal in New Hampshire.[1] In 1998, Derek Owen, a member of the New Hampshire state legislature, co-sponsored a bill to legalize and regulate the cultivation of "industrial hemp." The connection between the criminal statutes and Owen's bill is that both the drug commonly known as marijuana and various industrial products (e.g., rope) derive from different portions of the plant popularly called the hemp plant and designated *Cannabis sativa* in the Linnaean system of botanical classification.[2]

In general, the drug is derived from the flowers or leaves of the plant while the fibers used for rope and

[1] Federal statutes use the spelling "marihuana," but for uniformity we substitute the more popular spelling. In legal discourse, the term is variously used, sometimes to refer to the statutory definition, sometimes to the drug, and sometimes to the plant from which the drug is derived, so the reader must be alert to context.

[2] *See generally* Amala Raman, *The Canabis Plant, in Canabis* 29, 32 (David T. Brown ed. 1998); Robert Connell Clarke, *Marijuana Botany* 159-60 (1981); John Taylor, *Nomenclatural Nonsense and Legal Marihuana Plants, in The Species Problem of Cannabis: Science & Semantics* 96, 97-99 (Ernest Small ed., 1979), 5 *The New Encyclopedia Britannica* 827 (15th ed: 1994).

other industrial products are taken from the stalk. Cannabis sativa plants grown for industrial products generally are cultivated and mature differently from those intended for the marijuana drug. All contain THC (a short-hand reference to tetrahydrocannabinol), the ingredient that gives marijuana its psychoactive or euphoric properties; but those plants grown for drug use contain a higher concentration of THC than those grown for most industrial products. Owen's bill limited its definition of "industrial hemp" to those cannabis sativa plants containing a THC concentration of 1 percent or less.[3]

Several witnesses testified on Owen's bill before a New Hampshire house subcommittee. One witness, George Festa, appeared on behalf of the U.S. Drug Enforcement Administration ("DEA"). He testified that regardless of intended "industrial" use, the DEA views the cultivation of cannabis sativa plants as the manufacture of marijuana and therefore illegal under federal law (absent federal licensing).[4] Although Owen's bill was

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[3] For scientific background, see *United States* v. *Walton*, 514 F.2d 201, 202-04 (D.C. Cir. 1975); *United States* v. *Honneus*, 508 F.2d 566, 574-75 (1st Cir. 1974), *cert. denied*, 421 U.S. 948, 95 S.Ct. 1677, 44 L.Ed.2d 101 (1975), *and overruled on other grounds by United States* v. *Christensen*, 732 F.2d 20, 23 n.5 (1st Cir. 1984).

[4] Federal law makes it unlawful *inter alia* to "manufacture" a "controlled substance," 21 U.S.C. § 841(a)(1); "controlled substance" includes any substance listed in specified schedules, *id.* § 802(6); one such schedule lists "marijuana," *id.* § 812(c); and "marijuana" is elaborately defined as discussed below, *id.* § 802(16).

thereafter recommended for passage by the house committee, it was defeated on a relatively close vote (175 to 164) in the full house on February 6, 1998.

On April 30, 1998, Owen and the New Hampshire Hemp Council brought the present action in the federal district court in New Hampshire against the DEA Administrator. Owen, who farms in New Hampshire, said that he and the Hemp Council wanted to cultivate cannabis sativa plants to produce fiber and other industrial products but were deterred by the DEA's position. The complaint sought a declaration that in defining "marijuana," Congress had not criminalized the growth of "non-psychoactive" (*i.e.*, low-THC) cannabis sativa as well as an injunction to prevent the DEA from prosecuting producers. (Other claims were made – for example, that the Festa testimony violated the plaintiffs' First Amendment rights – but they are not pursued on this appeal.)

In May 1998, the magistrate judge held a hearing on the preliminary relief sought by plaintiffs. After the hearing, which included testimony from plaintiffs' expert relating to cannabis sativa, the magistrate judge recommended a denial of the request on the merits and dismissal of the case for lack of standing. On *de novo* review, the district court agreed that there was no standing; in the course of deciding the standing issue, the district court also determined that the federal statutory definition of marijuana, 21 U.S.C. § 802(16), includes cannabis sativa plants even if grown solely for the production of industrial products.

Owen and the Hemp Council now appeal, and we face at the outset several threshold objections by the

government. The first of these is the claim, seemingly endorsed by the district court, that the plaintiffs lack standing. Standing, in its Article III aspect, requires (generally speaking) an actual injury to a plaintiff traceable to the defendant's conduct and likely to be redressed by available judicial relief. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The district court reasoned that since New Hampshire law forbade production of cannabis sativa for industrial use, Owen could not grow the plants for this purpose, however the federal statute might be read.

Some might think this an unseemly argument by the government. After all, the DEA urged its own reading of the federal statute on the New Hampshire legislature to defeat, as fruitless, Owen's effort to legalize "industrial hemp" production under state law; and now, when a challenge is made by Owen to the DEA's reading of the federal statute, the DEA points to the continued existence of New Hampshire's ban as a reason why it is useless for us to review the DEA's interpretation. Joseph Heller's phrase "Catch-22" was not intended as a compliment.

In all events, Article III standing is largely, see 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3531.1, at 352, 362-63 (2d ed. 1984) – albeit not entirely, *compare id.* at 355-56 – a practical jurisprudence. Here, the existing New Hampshire drug statute is designed, in specifying which drugs are controlled, to mirror the federal listings. New Hamphsire's law initially defined substances by cross-reference to the then-existing federal schedules of controlled drugs, see 1985 N.H. Laws § 293:8; *State* v. *Cartier*, 575 A.2d 347, 350 (N.H. 1990), but provided that changes in the federal schedules are to be

adopted automatically, unless a designated state official makes a contrary ruling after a hearing. *See* N.H. Rev. Stat. Ann. § 318-B:1-a(V) (1995).

Thus, if cannabis sativa plants destined for industrial products were declared not to be marijuana under the federal statute, this would in due course probably lead to their treatment as lawful under New Hampshire law under the provision just cited. Accordingly, the declaratory relief sought by plaintiffs in this case as to federal law would as a practical matter likely provide them with meaningful relief sufficient to support standing under Article III. This is so without resort to speculation as to whether Owen's bill would be passed by the state legislature and would de-link New Hampshire "industrial hemp" regulation entirely from the federal scheduling scheme.

The government's other threshold objection is more conventional. In general, federal courts are disinclined to provide either injunctive or declaratory relief to foreclose federal criminal prosecutions in the absence of a reasonably clear and specific threat of prosecution. *See* 13A Wright, Miller & Cooper, *supra*, § 3532.5, at 175-80 (2d ed. 1984). This doctrine, which is often referred to as a standing requirement, is probably more complex in character, involving as well concerns about ripeness and the exercise of equitable discretion, *id.* at 189-91; but in all events the cautionary approach is well established, although somewhat relaxed where First Amendment interests are threatened. *See, e.g., Meese* v. *Keene*, 481 U.S. 465, 473 (1987).

Nevertheless, just how clear the threat of prosecution needs to be turns very much on the facts of the case and on a sliding scale judgment that is very hard to calibrate. It is true, as the government says, that some cases have seemed to draw a line between a general threat to the world and a specific threat to an individual, *see* 13A Wright, Miller & Cooper, *supra*, § 3532.5, at 176-77, but in yet other cases the courts are content with any realistic inferences that show a likelihood of prosecution, *id.* at 179-80. There may be a trend in favor of such a practical approach, *see, e.g., Mobil Oil Corp.* v. *Attorney General of Virginia*, 940 F.2d 73, 75-76 (4th Cir. 1991); *Hejira Corp.* v. *MacFarlane*, 660 F.2d 1356, 1360 (10th Cir. 1981), which Wright and Miller strongly endorse. *See* 13A Wright, Miller & Cooper, *supra*, § 3532.5, at 180-84.

Little risk exists that courts will be flooded with untoward pre-enforcement challenges; most issues in criminal cases turn on multiple facts that cannot be taken in isolation or definitively known in advance. Even where a statute appears to make conduct criminal, an unambiguous disclaimer of coverage by the prosecutor is likely to suffice. *Cf. Rhode Island Ass'n of Realtors, Inc.* v. *Whitehouse*, 199 F.3d 26, 31-33 (1st Cir. 1999). And, because declaratory and injunctive relief is discretionary, *Reno* v. *Catholic Soc. Servs.*, 509 U.S. 43, 57, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993), there is plenty of room for courts to deny improvident requests even if there is an otherwise ripe case and a realistic threat of prosecution.

We think that the threat of federal prosecution here is realistic. Owen, a farmer as well as a legislator, proposes to grow cannabis sativa plants to produce industrial products if permitted to do so. The DEA has made clear,

both by its conduct in New Hampshire and elsewhere, that it views this as unlawful under the federal criminal statutes governing marijuana. A recent DEA ruling, reflected in the Federal Register, takes the same view. *See Hemp Products Research Co.*, 63 Fed. Reg. 260, 261 (1998). Nor, as the medical-use controversy bears out, *see United States* v. *Oakland Cannabis Buyers' Cooperative*, 190 F.3d 1109 (9th Cir. 1999), is there any reason to doubt the government's zeal in suppressing any activity it regards as fostering marijuana use.

As for ripeness, the issue posed by Owen is an abstract one of statutory interpretation: whether the federal statute makes criminal the production of cannabis sativa for use in making industrial products. And the DEA's emphatic position equitably argues for review – not because there is anything wrong with the agency expressing its view but because, that view having been expressed, there ought to be a way to resolve the legal correctness of its position without subjecting an honest businessman to criminal penalties well known for their severity and inflexible administration. *See generally* 13A Wright, Miller, & Cooper, *supra*, § 3532.5, at 183-84.

The DEA points out that it can license marijuana production, *see* 21 U.S.C. §§ 822-23; 28 C.F.R. § 0.100(b) (1999), and that Owen has not sought a license. But whether viewed as a ripeness objection or one based on a failure to exhaust remedies, the objection is unsound here, even if there were some realistic prospect of a license for Owen. Owen's position is that his proposed production of industrial products is not marijuana production under the statute and therefore not subject to the statute at all, whether as a prohibition or licensing

scheme. If he were correct, it is hard to see why he should be forced to apply for a license. *Cf. Leedom* v. *Kyne*, 358 U.S. 184, 188-89, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958).

This is quite an excursion, although one not easy to avoid so far as it concerns an Article III standing objection, *see Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 93-102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), for a case that is fairly easy on the merits. For purposes of the federal criminal statutes, "marijuana" is defined – not by the DEA but by Congress – as follows:

> *[A]ll parts of the plant Cannabis sativa L.*, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. *Such term does not include the mature stalks of such plant, fiber produced from such stalks*, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

21 U.S.C. § 802(16) (emphasis added).

Owen's own complaint concedes that the industrial products at issue are produced from plants of the "species" cannabis sativa; strictly speaking, "cannabis" is the genus and "sativa" is the species, *see Honneus*, 508 F.2d at 574, and the "L." in the statute simply refers to Linnaeus' system of botanical classification, see *United States* v. *King*, 485 F.2d 353, 360-61 (10th Cir. 1973). Owen's own expert admitted at the preliminary-relief hearing that the

plant from which the industrial products are derived is cannabis sativa. The literature to which Owen cites in the complaint says the same thing. In short, on a literal reading of the statute, the plant – which is what Owen proposes to grow – is within the statute's ban.

Statutory language is the starting point in statutory interpretation, *e.g.*, *Schreiber* v. *Burlington Northern, Inc.*, 472 U.S. 1, 5, 105 S.Ct. 2458, 86 L.Ed.2d 1 (1985), and, without getting into refinements on which even the Supreme Court is divided, *see, e.g.*, *Sullivan* v. *Finkelstein*, 496 U.S. 617, 628 n.8, 110 S.Ct. 2658, 110 L.Ed.2d 563 (1990); *id.* at 631-62, 110 S.Ct. 2658 (Scalia, J., concurring in part), it is the ending point unless there is a sound reason for departure, *see Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). Here, nothing in Owen's complaint or arguments warrants a narrower reading, nor have somewhat similar arguments persuaded the several other circuits in which they have been advanced, in attempts to carve out various exceptions for cannabis sativa plants with low THC levels.[5] We take Owen's key arguments one by one.

Owen's main argument is that plants produced for industrial products contain very little of the psychoactive substance THC. However, the low THC content is far from conclusive. *See, e.g.*, *United States* v. *Proyect*, 989 F.2d 84, 87-88 (2d Cir.), *cert. denied*, 510 U.S. 822, 114 S.Ct. 80,

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[5] *See United States* v. *Traynor*, 990 F.2d 1153, 1160 (9th Cir. 1995); *United States* v. *Proyect*, 989 F.2d 84, 87-88 (2d Cir.), *cert. denied*, 510 U.S. 822, 114 S.Ct. 80, 126 L.Ed.2d 49 (1993); *United States* v. *Curtis*, 965 F.2d 610, 615-16 (8th Cir. 1992); *United States* v. *Spann*, 515 F.2d 579, 583-84 (10th Cir. 1975).

126 L.Ed.2d 49 (1993); *United States* v. *Spann*, 515 F.2d 579, 583-84 (10th Cir. 1975). It may be that at some stage the plant destined for industrial products is useless to supply enough THC for psychoactive effects. But problems of detection and enforcement easily justify a ban broader than the psychoactive variety of the plant. Owen's own expert testified at the preliminary hearing that young cannabis sativa plants with varying psychoactive properties are visually indistinguishable. And the statute does not distinguish among varieties of cannabis sativa.

Owen's best argument stems from legislative history. The present definition of marijuana was first employed in the Marihuana Tax Act of 1937, 50 Stat. 551. There, the basic definition covered all cannabis sativa plants whether intended for industrial use or drug production, id. at § 1(b), *see also* S. Rep. No. 75-900, at 4 (1937), but the statute effectively distinguished between them by taxing them differently. All producers of cannabis sativa and certain legitimate users (*e.g.*, doctors) were subject to a small tax, ($1 per year), Marihuana Tax Act § 2(a), 50 Stat. at 552; *see also* S. Rep. No. 75-900, at 4, but no tax was applied to transfers of the *mature* stalk of the plant, which is useful only for industrial use, S. Rep. No. 75-900, at 4, and which was specifically excluded from the definition of "marijuana," Marihuana Tax Act § 1(b), 50 Stat. at 551.

By contrast, to discourage "illicit" uses, an extremely high tax ($100) applied to *each* transfer of other parts of the plant to anyone who had not registered with the government and paid his own occupational tax. Marihuana Tax Act §§ 6, 7(a)(2), 50 Stat. at 553-54. And while the scheme permitted producers and legitimate customers to register (e.g., doctors, researchers), *id.* § 2, 50

Stat. at 551-52, it made no explicit provision for registration by most consumers (except to exempt entirely patients receiving marijuana by medical prescription, id. § 6(b), 50 Stat. at 553). Transfers that did not comply were made criminal. Id. §§ 4, 8, 12, 50 Stat. at 553, 555, 556. *See generally* S. Rep. No. 75-900; *Smith* v. *United States*, 269 F.2d 217, 218-20 (D.C. Cir.), *cert denied*, 361 U.S. 865, 80 S.Ct. 130, 4 L.Ed.2d 108 (1959).

In 1970 Congress adopted the Controlled Substances Act, 84 Stat. 1242 (codified at 21 U.S.C. § 801 *et seq.*), repealing the 1937 tax statute, 84 Stat. at 1291-92, but carrying forward its definition of marijuana into the present criminal ban on production, sale and possession, *see* note 3 above; *United States* v. *Walton*, 514 F.2d 201, 203 (D.C. Cir. 1975). While in 1937 Congress had indicated in legislative history that production for industrial uses would be protected (primarily by a relatively low tax), *see* S. Rep. No. 75-900, at 4; *Smith*, 269 F.2d at 218-20, we can find no indication that Congress in 1970 gave any thought to how its new statutory scheme would affect such production.

Given the 1937 intent to protect industrial uses and the carrying forward of the definition, Owen colorably argues that the 1970 statute should also be read to protect production for industrial uses by interpolating his distinction between psychoactive and non-psychoactive strains of cannabis sativa. The difficulty is that Congress' main vehicle for protecting industrial-use plant production in 1937 was not its basic definition of "marijuana," which included plants ultimately destined for industrial use; it was the complex scheme of differential tax rates and other requirements for transfers. That is the regime that was drastically modified in 1970 in favor of a broad

criminal ban (subject only to federal licensing), a ban which read literally embraces production of cannabis sativa plants regardless of use.[6]

The possibility remains that Congress would not have adopted the 1970 statute in its present form if it had been aware of the effect on cultivation of plants for industrial uses. But that is only a *possibility* and not a basis for reading the new statute contrary to its literal language, *see Robinson*, 519 U.S. at 340, 117 S.Ct. 843, at least absent a clear indication that Congress intended to protect plant production for industrial use as it existed under the prior tax statute. Nor, given Congress' enlargement of drug crimes and penalties in recent years, would one bank on its adoption of an exception strongly opposed by the DEA as constituting a threatened loophole in the ban on illegal drugs.

Owen hints at one other argument that cries out to be addressed. In a number of cases, the courts have extended the 1970 statute – arguably beyond its literal language – to embrace not only the sativa species of cannabis but what may (or may not) be several other cannabis species.[7] The courts found that these plants can

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[6] Of course, stalks and fiber can still be possessed, *see Limbach* v. *Hoover & Allison Co.*, 466 U.S. 353, 355, 104 S.Ct. 1837, 80 L.Ed.2d 356 (1984) (noting that hemp fibers are not grown in the United States but can be imported), but that is because of the explicit carve-out contained in the statute and underscored above.

[7] *See United States* v. *Kelly*, 527 F.2d 961, 964 (9th Cir. 1976); *United States* v. *Gavic*, 520 F.2d 1346, 1352 & n.9 (8th Cir. 1975); *Spann*, 515 F.2d at 581-82; *Walton*, 514 F.2d at 202-04; *Honneus*, 508 F.2d at 574-75.

provide the same level of THC as cannabis sativa grown for drug use, expressed doubts that they are (or at least were regarded by Congress as) species distinct from sativa, and felt confident that Congress did not mean to distinguish among related major THC agents. *E.g., Honneus,* 508 F.2d at 574-75.

If plants arguably beyond the literal language of the statute are condemned because of their THC content, this gives Owen some basis for contending that plants within the literal language should be excluded based on their (comparative) lack of THC content. But the symmetry is misleading. Reading the statute to cover other possible species rests (as just noted) on a number of grounds – not just THC content. By contrast, where cannabis sativa plants are grown for industrial use, the statute's coverage is supported alike by literal language, enforcement concerns and the broad application of the definition under the 1937 tax statute.

Despite the myth that Congress intends every result entailed by its statutes, new laws are often like jigsaw puzzles whose pieces do not quite fit; some have to be squeezed into place and there may be gaps in the pattern. But in this instance, on the issue of whether the statute includes all cannabis sativa plants, the considerations favor a literal reading of the statute and preclude Owen's construction.

Affirmed.

United States Court of Appeals

For the First Circuit

No. 99-1082

NEW HAMPSHIRE HEMP COUNCIL, INC. and DEREK OWEN,

Plaintiffs, Appellants,

v.

DONNIE R. MARSHALL, ACTING ADMINISTRATOR, UNITED STATES DRUG ENFORCEMENT ADMINISTRATION,

Defendant, Appellee.

ERRATA

The opinion of this court, issued on January 28, 2000, should be amended as follows:

On page 2, lines 11-12 of first paragraph, delete "*See generally* 5 *The New Encyclopedia Britannica* 827 (15th ed. 1994).", and then add the following as a footnote after "classification." "*See generally* Amala Raman, *The Cannabis Plant, in Cannabis* 29, 32 (David T. Brown ed., 1998); Robert Connell Clarke, *Marijuana Botany* 159-60 (1981); John Taylor, *Nomenclatural Nonsense and Legal Marihuana Plants, in The Species Problem in Cannabis: Science & Semantics* 96, 97-99 (Ernest Small ed., 1979), 5 *The New Encyclopedia Britannica* 827 (15th ed. 1994)."

App. 16

On page 2, line 4 of second paragraph, insert after "are" and before "cultivated" the words "derived from different strains and are".

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 99-1082

NEW HAMPSHIRE HEMP COUNCIL, INC., AND DEREK OWEN,

Plaintiffs, Appellants,

v.

U.S. DRUG ENFORCEMENT ADMINISTRATION, AND THOMAS A. CONSTANTINE,

Defendant, Appellee.

BEFORE

Torruella, *Chief Judge*
Selya, Boudin, Stahl, Lynch and Lipez, *Circuit Judges.*

ORDER OF COURT

Entered: March 28, 2000

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of this Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Phoebe D. Morse, Clerk.

By /s/ Janice M. O'Neil
Chief Deputy Clerk

[cc: Messrs. Blakeney, Goldberg, Stern, Martin and Ms. Witt]